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May 28, 2009

**VIA E-MAIL AND OVERNIGHT DELIVERY**

Ms. Jeanine Townsend,  
Clerk to the Board  
State Water Resources Control Board  
Office of Enforcement  
1001 I Street  
Sacramento, CA 95814

**Re: Water Quality Enforcement Policy Workshop 6/4/09**

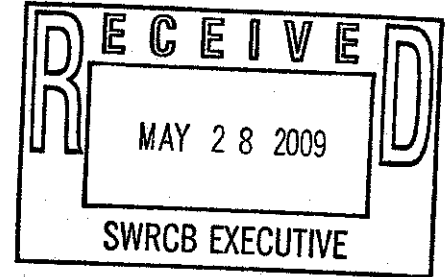
Dear Ms. Townsend:

We are the City Attorney for the City of Norwalk, California ("Norwalk") and wish to provide the following written comments to the May 6, 2009 draft of proposed revisions to the Water Quality Enforcement Policy ("Policy").

(1) Norwalk **approves and supports** the draft revision to the Policy with respect to Mandatory Minimum Penalties (MMPs) for NPDES violations, specifically Section VII, D.2, which excludes from the definition of a "Discharge Monitoring Report" which might otherwise be subject to MMPs, a report that in fact no discharge whatsoever occurred during the quarterly reporting interval.

(2) Norwalk **objects and recommends striking in its entirety** the third paragraph of the Draft Section VII.D.2, which currently reads:

"As a matter of practice, however, if such a report [of no discharge] has not been received, the Regional Water Board may presume that there were discharges during the relevant monitoring period and should consider imposing MMPs for the failure to timely submit a discharge monitoring report. The Regional Water Board shall not take final action to impose the MMP if the discharger submits a written statement to the Regional Water Board, signed under penalty or perjury in accordance with 40 CFR 122.41(k) and 40 CFR 122.22(a)(1), stating: (a) That there were no discharges to surface waters during the relevant monitoring period; and (b) the reason(s) the required report was not submitted to the Regional Water Board by the deadline."



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Norwalk **objects** to this language as putting into place a "presumed guilty until proven innocent" presumption which is warranted neither by traditional criminal law provisions applicable to penalties or forfeitures nor by any empirical evidence before the Board. Norwalk is familiar with the facts in its own case in which a change in staff personnel to a failure to submit such "non-discharge" reports. Norwalk has documented those facts to the Los Angeles Regional Water Quality Control Board and meet in person with members of the Enforcement Staff of that Regional Water Board to confirm those facts. Moreover, Norwalk is familiar with other instances in which municipalities did not submit reports of a lack of discharge from a new anticipated water supply well due to simple delays in the construction and development of the new water supply well. There is simply no empirical evidence before the State Board that justifies a "presumption" that the failure to file a timely report is an attempt to somehow cover-up an actual discharge to the surface waters of the State.

Norwalk further **objects** on the grounds that this type of "presumption of guilt" sets up an adversarial framework between the Regional Water Board and NPDES permittees that is counter-productive. The presumption of guilt contradicts the State's goal of having a long-term cooperative relationship between permittees and the Regional Water Boards.

(3) Norwalk **objects** to a portion of the revisions contained in Section VII.D. at p. 30, specifically the second full paragraph on page 30 which reads:

"Because penalties under section 13385.1 are assessed for each complete period of thirty days following the deadline for submitting a report, penalties may potentially accrue for an indefinite time period. Discharges who fail to conduct their require monitoring cannot go back and recreate and submit the data for a prior monitoring period. In such a case, an MMP for a missing report will continue to be assessed and reassessed for each 30 day period following the deadline for submission until an Administrative Civil Liability Complaint for MMPs is issued."

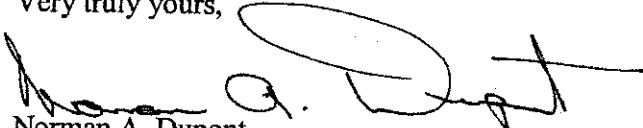
Norwalk **objects** on the grounds that this proposed Revision to the Policy misconstrues the statutory language of the Water Code and results in an improper reading of the provisions of the Water Code. Water Code Section 13385.1(a)(1) defines the term "serious violation" to also include a failure to file "a discharge

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monitoring report required pursuant to Section 13385 for each complete period of 30 days following the deadline for submitting the report." But, Water Code Section 13385(h)(1) in turn imposes a mandatory minimum penalty of \$3,000 for "each serious violation." Thus, a proper construction of both statutory provisions read together is that "a serious violation" occurs only if a discharge monitoring report is late by 30 days or more. Therefore, only a single \$3,000 MMP is warranted pursuant to Section 13385(h)(1). Any other construction of the two statutory provisions would result in an absurd penalty provision: That the Legislature intended to penalize more severely the submittal of a late report than it intended to penalize other types of "serious violations" including waste discharges that directly violated effluent limitations. This is not a plausible nor reasonable interpretation of the two statutory provisions, and should not be included in the revisions to the Policy.

The City of Norwalk is committed to working with the Los Angeles Regional Water Quality Control Board and the State Water Board in a constructive partnership to improve and maintain the highest quality of water quality in southern California. We appreciate the State Board's review and consideration of these comments.

Very truly yours,

  
Norman A. Dupont

cc: Mr. Thomas E. Lynch, Assistant City Manager  
Steven L. Dorsey, City Attorney